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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable William H. Alsup, Judge

FLUIDIGM CORPORATION, a	)	
Delaware corporation; and	)	
FLUIDIGM CANADA INC., a	)	
foreign corporation,	)	
	)	
Plaintiffs,	)	
	)	
VS.	)	NO. C 19-05639 WHA
	)	
IONPATH, INC., a Delaware	)	
corporation,	)	
	)	
Defendant.	)	
_____	)	

San Francisco, California  
Thursday, April 16, 2020

**TELEPHONIC TRANSCRIPT OF PROCEEDINGS**

**TELEPHONIC APPEARANCES:**

For Plaintiffs:

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Also Present: **Harris Fienberg, Ph.D.**

REPORTED BY: ANA M. DUB, RDR, CRR, CCRR, CRG, CCG  
OFFICIAL REPORTER, CSR NO. 7445

Thursday - April 16, 2020

8:41 a.m.

P R O C E E D I N G S

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**THE CLERK:** Calling Civil Action 19-5639, Fluidigm Corporation, et al. versus IONpath, Inc.

Counsel, please state your appearances for the record.

**MR. MARSHALL:** Good morning, Your Honor. Lee Marshall with Bryan Cave for Fluidigm.

**MS. MEHTA:** Good morning, Your Honor. Sonal --

**MS. COTTON:** This is Abby --

**MS. MEHTA:** I'm sorry. Go ahead.

**MS. COTTON:** I'm so sorry.

I'm sorry. This is Abby Cotton, also with Bryan Cave, for plaintiffs.

**MS. MEHTA:** Good morning, Your Honor. Sonal Mehta from WilmerHale on behalf of the defendant, and with me on the line is Dr. Harris Fienberg, the CEO of the defendant.

**THE COURT:** Anyone else?

All right. Good morning to all of you. Welcome.

So as I understand, we need a schedule for the showdown procedure. Now, didn't I give you that once before? I thought I did; but, no, I guess not.

What's the story there?

**MR. MARSHALL:** Your Honor, this is Lee Marshall for the plaintiffs.

1           No, Your Honor. You had given us a date for selection of  
2           the showdown claims, which then was slightly adjusted to  
3           account for getting all the contentions in place before the  
4           parties selected their showdown claims.

5           I don't believe we had scheduled past the selection of the  
6           claims; so that would be the purposes for the CMC.

7           **THE COURT:** All right. Have you done any discovery on  
8           this yet?

9           **MR. MARSHALL:** Your Honor, we have -- we've done some  
10          document discovery. We've exchanged some interrogatories. We  
11          have been talking with the other side about how to conduct  
12          depositions remotely under the current circumstances, and so  
13          we're going to be working on that. And we have, just last  
14          night, exchanged the claim -- the claim terms that need to be  
15          construed so that we're getting the claim construction process  
16          under way. So that's where we currently are.

17          As we indicate in the case management statement, we are  
18          obviously going to be working to get as much discovery as we  
19          can done under the current circumstances.

20          There may be an issue, for example, with respect to  
21          inspection of the accused device, the MIBIScope, which our  
22          experts would need to see in person; and so, you know,  
23          depending on how long the shelter-in-place is going on and the  
24          ability to travel, that may be an issue down the road. But  
25          I think we've decided to punt on that for now. And we've

1 proposed a schedule that's laid out in the case management  
2 statement.

3 **THE COURT:** Well, I think your schedule is too  
4 relaxed, and so we need to move it up.

5 I was proposing that the summary judgment motions be heard  
6 on August 20, with the opening briefs due on July 9. And that  
7 would be about three months from now.

8 What do you say to that?

9 **MS. MEHTA:** Your Honor, this is Sonal Mehta.

10 Before I ask -- I'm sure Mr. Marshall wants to address  
11 that. I just wanted to add one thing to the prior response to  
12 your question, which is about the status of the discovery.

13 There was one piece that I wanted to alert your court to  
14 because it may be relevant to the scheduling, and that is  
15 third-party discovery. Both sides have served third-party  
16 discovery. From our perspective, a lot of the third-party  
17 discovery relates to invalidity and to information about  
18 relevant prior art systems. There's also going to be  
19 third-party discovery with respect to named inventors, some of  
20 whom are not in the United States. And the Fluidigm team has  
21 served third-party discovery as well.

22 Relevant to the scheduling question, which I'll defer to  
23 Mr. Marshall to go first on in a moment, a number of the third  
24 parties have responded and said that they're unable to respond  
25 to document subpoenas at the moment because their facilities

1 are completely shut down and the relevant individuals are not  
2 able to go to the facilities to be able to collect documents in  
3 response to subpoenas. So we're running into some difficulty  
4 there, but I wanted to let you know that that is also in  
5 progress.

6 **THE COURT:** Okay.

7 **MR. MARSHALL:** Yeah. Your Honor, this is Lee  
8 Marshall, just responding to your question.

9 We certainly appreciate the purpose of the showdown is to  
10 get things -- you know, an early read on the case quickly, and  
11 so we appreciate that.

12 I do think, as I indicated, that it will be -- part of  
13 having a good record for Your Honor to make those decisions on  
14 summary judgment and, ultimately, if we need a trial, will be  
15 some expert opinions on the infringement issues. And given  
16 that the accused device is, you know, quite large and, if I  
17 understand it, they're quite expensive -- I think they're over  
18 a million dollars apiece -- you know, this is a device that our  
19 expert would have to travel to, to actually, you know, see it  
20 in use.

21 And so I think in terms of thinking about the schedule, we  
22 are willing to move as quickly as we can in the case. The  
23 issue, of course, is, you know, whether or not our witnesses  
24 are going to be able to travel and do what they need to do to  
25 give the Court, you know, the record that's necessary to decide

1 the case.

2 So that's the --

3 **THE COURT:** Those are fair points. But you're  
4 assuming that the shelter-in-place will be extended -- not only  
5 extended, but extended so long that it would be impossible for  
6 the experts to do that, and I think we ought to be more  
7 optimistic than that. And if it turns out that we have to  
8 extend it later because -- let's say, take the worst case: The  
9 shelter-in-place is extended well into the summer. Well, then  
10 we would have to adjust the schedule. But I don't want to go  
11 into this assuming the worst case.

12 So, all right. Here's what I'm going to do.

13 By the way, on claim construction, I do that at the time  
14 of summary judgment. I don't do that in a special *Markman*  
15 hearing. So you've got to keep that in mind.

16 **MR. MARSHALL:** Yeah. In our proposed schedule, we  
17 incorporated that concept, that the claim terms that need to be  
18 construed for the showdown claims would be determined as part  
19 of the summary judgment process.

20 **THE COURT:** All right. I'm going to read you a draft  
21 scheduling order.

22 The parties shall file cross motions for summary judgment  
23 on the two claims, one for each party, selected for the patent  
24 showdown. The parties are limited to one motion, regardless of  
25 the number of issues raised: standing, invalidity, and so

1     forth. You get one motion. Opening briefs are limited to  
2     25 pages of briefing and 150 pages of declarations and  
3     exhibits, not counting the patent itself. The opposition will  
4     be limited to 25 pages of briefing and 150 pages of  
5     declarations and exhibits. The replies must be limited to  
6     15 pages of briefing and 20 pages of declarations and exhibits.  
7     In the case of voluminous documents and transcripts attached as  
8     exhibits, counsel may append only the pages of the document  
9     necessary to support the assertions in the briefing and provide  
10    reasonable context, along with cover pages sufficient to  
11    identify the documents. Any judicially noticed material will  
12    count as an exhibit, but counsel may rely on exhibits and  
13    declarations already filed on the same motion by the other side  
14    without counting them against counsel's limit. All briefing  
15    and declarations must be double-spaced with 12-point font with  
16    only occasional single-spaced quotes and footnotes.

17       All right. Then I'm going to skip the claim construction  
18    part for a second and then say, the opening briefs are due -- I  
19    was going to say July 9, but I'm going to make it now  
20    September 3rd. I'm sorry. Yeah, we'll say September 3rd. And  
21    then the oppositions are due September 17; September 24th for  
22    the replies; and then the hearing will be October 15th at  
23    8:00 a.m.

24       All right. That's pretty close to what I think you were  
25    arguing for; correct?

1           **MR. MARSHALL:** Yes, Your Honor. We appreciate that.

2           **THE COURT:** All right. Now, I want to give you a  
3 schedule for the overall case for the rest of your case because  
4 you all are litigating on every possible, conceivable issue and  
5 I have to give you a schedule for that.

6           Have you done your initial disclosures yet?

7           **MR. MARSHALL:** Yes, Your Honor -- this is Lee  
8 Marshall -- we have.

9           **THE COURT:** All right.

10          **MS. MEHTA:** Yes, Your Honor.

11          **THE COURT:** All right. Just a minute.

12          Have I given you an overall case schedule yet?

13          **MR. MARSHALL:** Your Honor, this is Lee Marshall.  
14 No, you have not.

15          **THE COURT:** Have I given you a deadline by which to  
16 amend pleadings?

17          **MR. MARSHALL:** Your Honor, this is Lee Marshall.

18          I don't believe so. As you may recall, we went through a  
19 couple motions -- or, actually, we went through a motion to  
20 dismiss and then a motion for leave to amend, and we have a  
21 second amended complaint in place at this point.

22          **THE COURT:** Well, do you plan to bring any amendments  
23 to that?

24          **MR. MARSHALL:** Absent something coming up in discovery  
25 that we would learn, I'm not contemplating any at this point,



1 Your Honor.

2 **THE COURT:** All right. Well, anyway, I'm going to  
3 give you till May 28th to add new parties or to amend the  
4 pleadings. Not just to amend, but to seek to amend. May 28th.  
5 After that, the Rule 16 standard would apply.

6 What is your plan for mediation in this case? Do you have  
7 a private mediator in mind, or what's your thought on that?

8 **MR. MARSHALL:** Your Honor, this is Lee Marshall again.  
9 We have not discussed that recently with our colleagues on  
10 the other side. I do understand that there have been some, you  
11 know, discussions between the parties directly, and I'm not  
12 aware of the precise status of those discussions.

13 But in terms of, you know, asking for a mediation in  
14 particular, we're certainly open to that. I think getting  
15 through the showdown would be helpful, from my perspective.

16 And I will yield to Ms. Mehta.

17 **MS. MEHTA:** Yes, Your Honor. So I think Mr. Marshall  
18 is correct. There's been some informal discussion between the  
19 parties. I also don't know exactly the status of that, but  
20 I believe those discussions are ongoing.

21 With respect to mediation, I think in this case -- and,  
22 again, this is our position; I haven't talked to Mr. Marshall  
23 about this in the last few weeks -- I think we could certainly  
24 do private mediation. I'm also respectful of the fact that  
25 the Court's magistrate judges are quite busy. They're also

1 very effective. So if the Court were to suggest that we go to  
2 a magistrate judge, we'd also be open to that; but in lieu of  
3 that, I think private mediation down the road would also be  
4 workable.

5 **THE COURT:** All right. I'm going to come back to that  
6 in a second.

7 The fact discovery cutoff will be January 29 of 2021.  
8 That's also the date that your expert reports are due if you  
9 have the burden of proof on that issue. And then, when you get  
10 the order, you'll see that the opposition expert reports are  
11 due 14 days after that.

12 And so you'll see how it's laid out. I've used it for  
13 21 years. This schedule works great.

14 All right. Then we come to last day to file summary  
15 judgment. Now, this is on issues other than the showdown  
16 procedure.

17 Last day to file for summary judgment will be March 4,  
18 2021; final pretrial conference will be June 3rd, 2021; and a  
19 jury trial that will begin on June 21 -- no -- June 14, 2021.

20 And then we go to the point about the -- I'm going to  
21 refer you to a magistrate judge. Do you two have -- give me  
22 some ideas on a magistrate judge who you think would like to do  
23 this case.

24 **MS. MEHTA:** I can't speak for the magistrate judges.  
25 I don't know if they'd like it or not.

1       One judge that just comes immediately to top of mind is  
2 Judge Beeler, Your Honor, but I think there's a number of  
3 judges in the district that have significant patent experience  
4 that could be useful in a case like this.

5           **MR. MARSHALL:** Your Honor, this is Lee Marshall again.

6       We would not object to Magistrate Beeler.  
7 Magistrate Corley is also someone who may be quite good for  
8 this case.

9           **THE COURT:** You both mentioned Beeler; so  
10 Laurel Beeler is it.

11       Okay. Now, I've found in these patent cases that the  
12 lawyers say they will be reasonable but then they almost  
13 immediately start with discovery disputes. And I'm willing to  
14 do the discovery disputes as long as it's just a few; but if it  
15 turns out to be the typical patent lawyer thing, with about  
16 every four or five weeks you have another dispute, I'm going to  
17 just send it to a different magistrate judge for supervision.

18       So I need to take your temperature, and you tell me how  
19 reasonable you're going to be in this case and how many  
20 disputes you foresee coming up.

21       Plaintiff first.

22           **MR. MARSHALL:** Apologies, Your Honor. This is Lee  
23 Marshall. I was slow in getting my phone off of mute.

24       I will say that, you know, there are always some disputes.  
25 Ms. Mehta and I have been opposite each other in at least one

1 other case that I can think of, and we have developed, I think,  
2 a constructive, professional relationship. We were able to get  
3 on the same page in terms of a proposed schedule, which is not  
4 always easy.

5 I anticipate there are going to be some disputes, but I  
6 don't think that it will be, you know, on the magnitude or  
7 level that perhaps you've experienced in other patent cases.

8 **THE COURT:** Defense?

9 **MS. MEHTA:** Your Honor, this is Sonal Mehta.

10 I suspect that no litigant would tell you that they expect  
11 to have a lot of discovery disputes. But I echo Mr. Marshall's  
12 comment, which is, I think so far in this case, the parties  
13 have been able to work together constructively, and he and I  
14 have an existing relationship as adversaries that has suggested  
15 that that will continue to be the case, and we will do  
16 everything we can to have it continue to be the case.

17 **THE COURT:** All right. I'm going to keep the  
18 discovery disputes for the time being. Read my discovery  
19 guidelines. Those would apply, even if we sent it to a  
20 magistrate judge. But read my -- do you know -- have you seen  
21 my discovery guidelines?

22 **MR. MARSHALL:** Yes, Your Honor.

23 **MS. MEHTA:** Yes, Your Honor.

24 **MR. MARSHALL:** Lee Marshall.

25 We've reviewed them.

1           **THE COURT:** I particularly want you to be aware of how  
2 I feel about the abuse of Rule 30(b)(6). So please make sure  
3 you read that one. That comes up a fair amount, and I want you  
4 to be aware that I don't like the abuse of Rule 30(b)(6).

5           All right. I am going to give you a chance to try to talk  
6 me out of this overall schedule. Plaintiff first.

7           **MR. MARSHALL:** Your Honor, I'm not going to try to  
8 talk you out of the overall schedule.

9           I think that there are a couple of things that perhaps  
10 either some clarification or guidance would be helpful --

11           **THE COURT:** Sure.

12           **MR. MARSHALL:** -- to the parties.

13           One thing that we were a little unsure of -- and we  
14 included something in the case management statement on this --  
15 is, at least as I understand it, the showdown is on direct  
16 infringement and invalidity issues; that you're not going to be  
17 looking at remedies or damages at the time of the showdown  
18 summary judgment.

19           Is that understanding correct?

20           **THE COURT:** The dollar amount of damages does not have  
21 to be adjudicated in this round. But let's say you, as the  
22 plaintiff, let's say you win on the showdown and that you  
23 achieve victory and show that the product is infringing. Well,  
24 then your very next motion should be one to take it off the  
25 shelf and an injunction against selling it.

1       That's the whole point of this. And I would expect that  
2 to be very quick; that we would either take the product off the  
3 shelf if it's infringing or maybe there's a design-around. I  
4 don't know. But then there could be a later trial on the  
5 amount of damages.

6       But the initial -- the showdown is to get at: Is there  
7 infringement by the accused product, number one, direct  
8 infringement? And/or is this patent -- is that claim -- is  
9 that claim valid or invalid? That's what I want to get at.

10       So does that answer your question?

11       **MR. MARSHALL:** Yes, Your Honor, it does. That was  
12 helpful.

13       And then the other thing --

14       **THE COURT:** Just to be evenhanded on this, if you were  
15 to lose and let's say you lost so badly that I thought this was  
16 an exceptional case, and very quickly the other side would  
17 bring a motion for attorneys' fees to sock your client with the  
18 attorneys' fees they've expended on a worthless case -- I'm not  
19 saying the case is worthless. I'm just saying that's the whole  
20 point of this procedure, because there are a lot of cases out  
21 there where the plaintiff claims are worthless and they should  
22 never have been brought. There are also cases where the  
23 plaintiff's claims are valid and infringement is going on and  
24 the defendant should be socked.

25       So the whole point is to give you both your best shot at

1 those alternative outcomes.

2 So in one case, I did hit the plaintiff with exceptional  
3 fees right off the bat; and in another case, the plaintiff's  
4 claims lost but it was a reasonable argument.

5 I don't think I've had yet a case where the plaintiff has  
6 gotten an injunction, but I am open to that. I promise you  
7 that if you can prove infringement, taking the product off the  
8 shelf is going to be on the table quickly.

9 So that's the whole point of this procedure, is to put  
10 both sides at risk; where instead of waiting until the end of  
11 the entire case, you both get your best shot at drawing first  
12 blood, so to speak, right off the bat. Of course, it's not  
13 really right off the bat. It's several months into it. But  
14 rather than waiting a year and a half, you only have to wait a  
15 half a year.

16 All right. Any questions about that?

17 **MR. MARSHALL:** No, Your Honor, not from plaintiff.  
18 That was helpful.

19 **THE COURT:** How about --

20 **MS. MEHTA:** Your Honor?

21 **THE COURT:** Yes.

22 **MS. MEHTA:** Yes, Your Honor. I'm also not going to  
23 try to talk you out of the overall schedule but would ask for  
24 clarification on one issue --

25 **THE COURT:** Sure.

1           **MS. MEHTA:** -- which is, understanding that Your Honor  
2 does not do a separate claim construction hearing and that we  
3 will brief claim construction issues that are relevant to  
4 summary judgment disputes that are briefed before Your Honor,  
5 we wanted to ask -- and I believe the parties are aligned on  
6 our thinking on this, but we wanted to get your guidance on  
7 whether the Court is expecting the parties to comply with the  
8 claim construction briefing deadline in the patent local rules.

9           **THE COURT:** Yes.

10          **MS. MEHTA:** I think both sides -- okay. So you would  
11 like us to fully brief claim construction?

12          **THE COURT:** Yes. Those local rule things keep going  
13 on independently of the -- but you've still got to brief for  
14 me -- in the summary judgment, you've got to brief what your  
15 claim construction issues are.

16          **MS. MEHTA:** Okay, Your Honor. Understood.

17          And one other clarification, which is, with respect to the  
18 patent local rules briefing deadlines, do you want us to brief  
19 claim construction with respect to all of the patents on the  
20 current schedule or the showdown patents on the current  
21 schedule?

22          **THE COURT:** Everything. I am not relieving anybody  
23 from anything that the local rules require you to do. That has  
24 to keep going on for the benefit of the overall case.

25          But the showdown thing is a way to expedite and get to a



1 quicker result on what each of you think is your best claim.

2 **MS. MEHTA:** Understood, Your Honor. Thank you.

3 **THE COURT:** Thank you. All right.

4 All right. So I don't hear any other heartburn. I'm  
5 going to get an order out that captures what we did here today,  
6 unless somebody has any other case management issue you want me  
7 to bring up.

8 **MR. MARSHALL:** No, Your Honor. Thank you very much.

9 **MS. MEHTA:** No, Your Honor. Thank you.

10 **THE COURT:** Good luck to both sides. I'll get an  
11 order out pronto. Bye-bye.

12 **MS. MEHTA:** Thank you, Your Honor. Bye-bye.

13 **MR. MARSHALL:** Thank you. Bye.

14 (Proceedings adjourned at 9:06 a.m.)

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16  
17 **CERTIFICATE OF REPORTER**

18 I certify that the foregoing is a correct transcript  
19 from the record of proceedings in the above-entitled matter.

20  
21 DATE: Thursday, April 30, 2020

22   
23 \_\_\_\_\_

24 Ana M. Dub, CSR No. 7445, RDR, CRR, CCRR, CRG, CCG  
25 Official Reporter, U.S. District Court